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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/693,527

10/24/2003

Lewis Michael Popplewell

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EXAMINER

ROGERS, JAMES WILLIAM

ART UNIT

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1618

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/693,527
Filing Date: October 24, 2003
Appellant(s): POPPLEWELL ET AL.

XuFan Tseng Reg. No. 55,688
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 04/14/2008 appealing from the Office action mailed 11/14/2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

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6,096,699	Bergemann et al.	8-2000
Material Safety Data Sheet		12-1996
Klucel		
Hydroxypropylcellulose		

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 26-27 and 29-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bergemann et al (US 6,096,699).

Bergemann discloses a composition that is a homogenous liquid comprised of A) 10-90% lactate ester, B) 10-90% of an edible oil ester (including corn, mustard, olive, peanut, poppy and the like, thus meeting flavor or fragrance material), C) 0-25%, or more preferably 4-7% surfactant and D) 0-10%, or more preferably 4-7% thickener including hydroxypropyl cellulose. See abstract, col 3 lin 14-col 5 lin 50. The weight % of the edible oil overlaps with applicants claimed invention, therefore applicants claimed range is obvious over Bergemann because a prima facie case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art. Regarding claims 29 and 34 which limit the surfactant, firstly the lactate ester A) from above meets the limitation of a mono or di-glycerol ester of a fatty acid and secondly Bergemann incorporates by reference all surfactants including sorbitol esters included within the International Cosmetic Ingredient Dictionary, 5th ed.

(10) Response to Argument

Appellant's assert that Bergemann discloses that the solvent can contain from zero to about 10 percent of a thickener, thus appellants surmise the thickener is a non-essential ingredient within the composition. Appellants further assert Bergemann discloses water soluble celluloses such as methylcellulose and hydroxypropyl methyl cellulose which are preferred embodiments while their claimed invention excludes such celluloses. Thus appellants surmise Bergemann would not lead one skilled in the art to essentially include a cellulose polymer in the composition let alone recognize the criticality of the types of cellulose polymers to be included.

The examiner respectfully disagrees with appellants assertions above. Firstly Bergemann clearly discloses the use of thickeners, they were preferably present within the composition in amounts from 4-7% and are even claimed within the claims of the reference as being present, thus thickeners are essential enough to the invention to be included in the claims of the patent. Secondly the exemplary thickeners included appellant's claimed hydroxypropyl cellulose and the preferred exemplary thickeners included the commercially available product Klucel®, which is hydroxypropyl cellulose. See included Material Safety Data Sheet. Thus contrary to appellants assertion one of ordinary skill from the disclosure of Bergemann could see that preferably a thickener was used in concentrations between 4-7% of the total composition and the preferred thickener to use in the composition is hydroxypropyl cellulose. Just because Bergemann discloses the use of other types of thickeners does not discredit or teach away from

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using hydroxypropyl cellulose especially since it is disclosed as a preferred thickener.

“The prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed...” *In re Fulton*, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004).

Appellants lastly assert that they have shown the particular cellulose polymers claimed are critical and achieve unexpected results relative to the prior arts disclosure in its entirety.

The relevance of the above assertion is unclear. The examiner notes that appellants merely allege that their composition achieves an unexpected result using the claimed cellulose polymers but provide no data or explanation of any type of unexpected result compared to the Bergemann reference besides their mere allegation. As stated above Bergemann clearly discloses the use of thickeners that are preferably used within applicants claimed weight % range and a preferred thickener is hydroxypropyl cellulose.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

James William Rogers, Ph.D.

/James W Rogers, Ph.D./

Examiner, Art Unit 1618

Conferees:

/Michael G. Hartley/

Supervisory Patent Examiner, Art Unit 1618

/James O. Wilson/

Supervisory Patent Examiner, Art Unit 1624